

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RAHMAN J. ARSHAD,

Plaintiff,

-v-

MICHAEL J. ASTRUE, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.
----- x

07 Civ. 6336 (JSR)

ORDER

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>8-28-09</u>

JED S. RAKOFF, U.S.D.J.

On April 6, 2009, the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, issued a Report and Recommendation ("Report") in the above-captioned matter recommending that defendant's motion and plaintiff's cross-motion for remand to the Commissioner be granted and that plaintiff's motion for judgment on the pleadings be denied. Subsequently, on May 12, 2009 plaintiff submitted objections to the Report, and on May 29, 2009 defendant submitted a response. Plaintiff requested oral argument on two issues raised in his objections: (1) the meaning of 20 C.F.R. § 404.1574(b)(3)(ii)(A), which provides that a plaintiff may be found to have engaged in substantial gainful activity ("SGA") even if his earnings fell below the SGA threshold; and (2) the validity of the Commissioner's contention that the Court should not address the medical merits of plaintiff's claim since the administrative law judge never reached them. The Court heard oral argument on both issues on June 24, 2009.

After reviewing the parties' motions de novo and giving careful consideration to the arguments put forth at oral argument, the Court finds itself in complete agreement with Magistrate Judge Fox's Report

and hereby adopts its reasoning by reference. At oral argument, plaintiff conceded that he had not raised the first issue before Judge Fox in his original motions and had not petitioned Judge Fox for reconsideration. See transcript, 06/24/09. Therefore, plaintiff cannot raise this argument in his objection to the Report. See Chisholm v. Headley, 58 F. Supp. 2d 281, 284 n.2 (S.D.N.Y. 1999) ("a petitioner is not permitted to raise an objection to a magistrate judge's report that was not raised in his original petition"). Since additional fact-finding on whether plaintiff was engaged in SGA is necessary, remand is appropriate for the ALJ to proceed with the remaining steps of the sequential evaluation to determine plaintiff's disability status. See Williams v. Apfel, 204 F.3d 48, 50 (2d Cir. 1999) (holding that "the district court was required to remand the case so that step five of the sequential analysis could be completed and a full record developed before any award of benefits was made"). Accordingly, the Court hereby adopts the Report, denies plaintiff's motion for judgment on the pleadings, grants the parties' motions for remand, and directs the Commissioner to conduct administrative proceedings consistent with Judge Fox's Report.

SO ORDERED.



JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
August 28, 2009